No. 91-1009

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RICHARD NEAL SCHOWENGERDT,

Petitioner

v.

THE UNITED STATES OF AMERICA, ET. AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I

INTRODUCTION

Petitioner received Private respondents' Brief in Opposition on 6 March 1992 and Government respondents' Brief in Opposition on 10 March 1992. Petitioner responds herein by exception as large portions of the briefs are restatements of the case and issues.

II

REPLY TO PRIVATE RESPONDENTS' BRIEF

The following ' page numbers and lines highlight petitioner's objections to statements made by private respondents.

1. Page 5, Lines 7-14 - Petitioner objects to the statement "the undisputed evidence demonstrated petitoner did not have a reasonable expectation of privacy.....by the federal respondents." There is no "undisputed evidence"; this is precisely the issue in contention. General Dynamics, as operator of the facility, was empowered by the government to enforce security regulations under standard provisions of the Defense Industrial Security Office (DISCO) and the existing contracts. As the petitioner has already extensively delineated, none of the government regulations in effect authorize seizure and confiscation.of personal materials, unless the items are on the list of prohibited materials. In fact, General Dynamics' own internal Guard Force Policies and Procedures Manual prohibits security personnel from tampering with employees' personal materials (See Appendix E of Petition). The DISCO Security Manual deals only with procedures and precautions for handling and safeguarding classified material. Respondents have consistently failed to produce any rule, regulation, statute, or other document which authorizes seizure and confiscation of personal materials unrelated to work under contract. Respondents assume that because security officials can search for evidence of security compromise that this automatically voids an employee's expectation of privacy for nonwork-related personal materials in the office and furniture. Such is not the case. Petitioner had over 27 years of experience in this highly regulated industry and is clearly aware of

what is job related and what is not. Therefore, petitioner insists that his Fourth Amendment rights to privacy of personal materials was violated.

2. Page 6, Lines 5-8 - Petitioner objects to the words "factual issue." It is not a "factual issue" which is in contention here but an issue of interpretation of the propriety of the act of seizure on the part of General Dynamics and Kessel; petitioner has asked the Court to review such propriety.

3. Page 6, Paragraph B.1, 3rd Sentence - Petitioner had no duties at the Pomona facility in his capacity as Chief Warrant Officer; his duties at the facility were solely related to his position as a GS-801-13 Test and Evaluation Engineer with the Aegis Program Office. As a Chief Warrant Officer petitioner was responsible only to his Naval Reserve Unit at the Naval Air Station in Point Mugu. Therefore, any letters, documentation, or other information related to his Naval Reserve position should not have been within the jurisdiction or scope of interest of General Dynamics or Navy officials at the Pomona facility; therefore, such material should not have been considered as related in any way to his civilian position at that facility.

4. Page 7, Lines 4-24 - Employees at the Pomona facility were not "constantly searched" in 1982 and such procedures were not any more "unduly invasive" than many commercial firms whose guards regularly examine offices, factories, and employees' briefcases upon departure from their facilities. Respondents are attempting to paint a picture of the Pomona facility which did not actually exist. Offices were examined, not searched, for the presence of unsecured classified documents, or possibly stolen contractor/government equipment. Only on periodic occasions, approximately once every six months, classified

safes were opened and inventoried to determine whether or not only classified material was properly stored in such containers. Upon leaving the plant, employees were required to open brief cases and other unsealed parcels to ensure that no classified documents or contractor/government property was present. Respondents' arguments reveal that they are not really cognizant of DISCO security procedures; if classified material is properly wrapped and addressed, it can be carried out ready to mail in which case they are never opened. Also, personal materials were not examined nor were they commented upon as stated in the aforementioned Guard Force Polices And Procedures Manual. On rare occasions (once every six months or so) drivers were required to open their vehicle trunks for inspection. The purpose here was usually to examine for the presence of contractor or government property.

5. Page 7, Last Paragraph, Page 8, First Paragraph - Here again, respondents are implying that because petitioner was aware of possible compromising romantic situations, that he ignored such precautions...such is not the case. In his private affairs, petitioner never compromised security in any way. Any indication that anyone was actually interested in details of his job would have resulted in an immediate report.

6. Page 9, Second Paragraph - In stating that petitioner was aware of the responsibilities of General Dynamics' security investigators, respondents are attempting to broaden the scope of their responsibilities beyond what actually existed in 1982. General Dynamics' investigators were not Department of Defense intelligence agents and were not empowered with any investigative authority outside of protection of contractor/government property or classified information.

7. Page 9, Paragraph 3, to Page 11, Line 2 - Petitioner strenuously objects to the title of this paragraph as well as this entire section. Respondents reacted to an anonymous phone call that "...material of interest to the security department" was present in petitioner's office; yet there was no tangible information prior to or after the search that indicated any kind of compromise. Furthermore, respondents found only private letters and other memorabilia belonging to petitioner. Since no indication of any kind of compromise was found nor did any actually exist, the search should have ended there. Petitioner has explained in his Petition why he had the inscription "Strictly Personal and Private...etc.." on the envelope. Aside from respondents' hasty erroneous conclusions immediately following the search, respondents are patently incorrect in stating on Page 10, Lines 21-33, and Page 11, Lines 1-2, that such correspondence suggested "...petitioner may have compromised security on numerous occasions." Is it wrong to reveal your generic occupation or give an acquaintance your telephone number? Does General Dynamics require such secrecy of all of their employees? Even if they do, General Dynamics has no jurisdiction over the private lives of Federal employees. Respondents' implication that the "Italian Stewardess" was a foreign agent or seeking classified information is ludicrous. Firstly, the stewardess in question was of Italian descent and not a foreign national; secondly, she had no interest whatsoever in petitioner's occupation; thirdly, petitioner never actually met her. How far can this be from a compromise of security?

8. Page 11, Paragraph 4 - While petitioner finally but reluctantly agreed that the search might have been justified as a precautionary measure, petitioner never agreed that seizure and confiscation of his personal materials was warranted. As an example, a hypothetical

situation where such an act might have been warranted would have been if it had been discovered that an employee had been consorting with a foreign national who had more than a casual interest in his work and where the employee might have been placed in a compromising position, i.e. one in which a blackmail situation could occur. In security terms such a conjunction is termed a nexus. In the instant case, it was determined that there was no such nexus. Petitioner contends that respondent Kessel acted wrongly in seizing the manila envelope and turning it over to Naval authorities. He could have easily contacted petitioner and discussed the situation if he really believed that there was a potential for blackmail or compromise of security. Petitioner must again remind the Court, however, that documentation in the record, especially the Naval Investigative (NIS) Report, an excerpt of which was filed with the Petition as Appendix F, stated that the initial cause for the investigation was for the possession of pornography. Petitioner notes that respondents object to the inclusion of Appendix F on the alleged grounds that it was not in the district court record. Petitioner is uncertain at this point which portions of the NIS report were filed with the district court record; however, this report formed the basis upon which petitioner was discharged from the Naval Reserve and petitioner is certain that the enire report is in the Navy Review Board records. The NIS investigation has been a central issue throughout this long and complex case; had it not been for this investigation, petitioner's complaint may never have been filed. The NIS report has nearly a dozen pages but no where in the report is the word blackmail mentioned nor is it even alluded to. The entire thrust of the investigation was oriented toward possible illegal activities of petitioner and concluded in his final exoneration.

9. Page 11, Paragraph 5 - While petitioner concedes that very specific romantic or sexual liaisons could result in creating a potential for blackmail, surely the Navy does not insist that their employees practice continence or refrain from romantic activities. Any romantic or sexual activity that may have the potential for blackmail has to be evaluated in light of the aforementioned nexus which has to exist before it is elevated to the status of a security concern. This is precisely the issue and question before the Court with respect to the private respondents: did Kessel act correctly in prejudging the material inside the manila envelope as constituting the basis for potential security compromise? Petitioner submits that his judgment was premature and precipitated a chain of events which caused irreparable harm to petitioner. As was proven later, there was no security nexus between petitioner's activities and his position or work at the Pomona facility. Petitioner maintained his security clearance and obtained two new clearances after the events of 1982. However, the actions of the private respondents in seizing the manila envelope and turning it over to Naval authorities resulted in his unjustified discharge from the Naval Reserve and unwarranted delays in granting security clearances with two employers (Northrop Corporation in 1984 and the Defense Logistics Agency in 1990). While respondents may investigate all they want to, such a seizure of personal materials should be done only after a determination has been made that a security compromise exists. Otherwise, employees could be deprived of their constitutional guarantees of privacy solely on the basis of an arbitrary and capricious assumption.

10. Pages 12-14 - Petitioner disagrees with the entire argument presented in this summary; again, there is no "undisputed evidence" nor

is there any evidence at all concerning whether or not peitioner should have a reasonable expectation of privacy. Nor was there any "factual determination" made by the lower courts; there were only judgments that petitioner could not have a reasonable expectation of privacy because of the "operational realities." Petitioner submits that these so-called "operational realities" are a fiction; security at the General Dynamics facility was less than that which existed at Flour Corporation in Irvine, for example, in 1982. Petitioner visited the Flour facility around that time period and found that the level of security there was at a level of at least twice that at the Pomona facility, yet there is no classified information on contract. Yet I would expect that employees at Flour would have enjoyed privacy of personal materials in their desks. Defense contractors by no means have a monopoly over highly regulated security procedures. Multinational corporations, industrial, commercial, or financial frequently have security concerns which are equal to that of a defense contractor. Yet the "operational reality" of any facility should not in any way infringe upon an employees right to privacy of personal materials in his desk or on his person; an employer does not have to take your wallet, for example, which you may leave in your desk and rummage through it; nor does he have to rummage through a file in your desk that pertains to a course you are taking at the local community college. Personal materials can easily be distinguished from work-related materials. If employers seek to decree that a personal material is work-related, they must be constrained by the courts to make this judgment at their peril.

11. Pages 14-17 - Petitioner disagrees with respondents' entire circuituous reasoning in this section. Petitioner has personally studied and argued in pro per all of the major cases pertaining to

privacy in the workplace for nearly a decade and believes that he has a reasonably good understanding of these cases. Petitioner submits that the majority of case opinion regarding privacy in the work place supports his position that a search and seizure must be work-related. While it is conceded that under the terms of the General Dynamics Security Agreement with the Navy that intensive searches were the rule of the day, these searches were for the specific purpose of securing classified documents and government/contractor property and not to pry into personal affairs of employees. Respondents seek to broaden the scope of their responsibility to include searches related to off-duty activities of government employees. Kessel was not a Department of Defense investigator and was not empowered to look into such matters, particularly with regard to petitioner, who was not a General Dynamics employee. Whether or not Kessel may have been justified in invading the privacy of one of their own employees is uncertain, at least in the mind of petitioner. It would appear that even in such a case, there would have to be convincing evidence that security had been compromised before a seizure of personal property should be exercised. In any case, the material seized would have to be work-related.

12. Pages 17-20 - Petitioner disagrees with this entire argument; again, he has not asked the Court to review a "factual determination" but rather to review judgments based upon no facts in evidence. There is no evidence whatsoever that the material seized by respondents revealed that a security compromise had actually taken place nor even could have reasonably taken place under the circumstances. Petitioner has asked the Court to review whether or not the so-called "operational realities" of the workplace at the Pomona facility in 1982 negated his reasonable expectation of privacy; this is not a factual determination.

While there are factual issues still in dispute which were mentioned in the Petition as well as herein, the petitioner has requested that the Court specifically review the judgments and not "factual determinations." It appears that respondents seek to impose a contractual agreement upon petitioner which did not in fact actually exist, i.e. that personal materials were subject to search and seizure regardless of their work-relatedness, a position which could lead to employee lawsuits based on contractual theory. Accordingly, respondents' case citations are meritless as the petitioner does not seek review of facts beyond those which come within the scope of the "clearly erroneous rule." If, however, the record does not support so-called "factual determinations," perhaps these determinations should be reviewed. Respondents suggest that the manila envelope contained information that might have led someone to believe that a security compromise could have taken place if other factors had been present. Anyone with training in probability theory will readily concur with petitioners position that the net probability (P) of an event actually occuring decreases geometrically as multiplier subprobabilities increase [P = (might)(could)(if)]. It does not take a mathematician to understand that such an important decision as whether or not a security compromise has been made should not turn upon what could happen if several unlikely events cojoin. Respondents have only alluded to a "possible" compromise of security with regard to the materials in the manila envelope; anything is "possible;" does this give an employer the right to seize personal materials on the outside chance that it "might" involve a security compromise? The comfortable security "blanket" is often used to provide warmth when there is no real evidence of work-relatedness.

II

REPLY TO GOVERNMENT RESPONDENTS' BRIEF

1. Page 3, Lines 1-3 - The word "must" should be deleted. Sealed packages ready for mailing were never opened for inspection during the thirteen years that petitioner was employed at the Pomona facility. Petitioner personally carried sealed packages, both work-related and personal, which were wrapped for mailing through the Building 4 Lobby and dropped them into the mailbox outside the building on countless occasions; guards would glance at the packages and when it was observed that they were wrapped for mailing, they were not opened. Call this a "hole" or whatever in the security blanket, but this is a fact.

2. Page 5, Footnote 2 - Petitioner again objects to the insinuation that there was something wrong with including photographs of himself, his name, and telephone number in correspondence with potential acquaintances. Whether or not petitioner was photographed nude is irrelevant; respondents seek to place a moral judgment upon a natural state of man. Secondly, petitioner again objects to the insinuation that the "Italian flight attendant" was a foreign national; this is pure assumption, and, as stated previously, the attendant was not a foreign national.

3. Page 5, Paragraph 2 - Kessel's initial reaction was that of moral indignation as he personally stated to petitioner that "one of our employees would have been immediately fired for having that kind of material on the premises" or words to that effect shortly after the seizure. As previously stated, the Naval Investigative Report, which both public and private respondents are eager to suppress, does not even once mention the word blackmail in all of its eleven pages. Early court

records will show that the defense in the 1983-87 era was that petitioner possessed pornographic material which could have been "embarrassing to the government." Respondents attempted to implicate petitioner in something illegal but when the U.S. Attorney and Postal authorities declined to prosecute, the matter was dropped. This early era defense relied upon the hope that petitioner could not, under any circumstances, enjoy any privacy in the workplace. After the 1987 Appellate ruling to the contrary, respondents adopted the comfortable security blanket defense (which usually requires little or no justification or connection with reality) and the blackmail hypothesis.

4. Page 5, Paragraph 3 - Petitioner contends that Agent Jensen was immature, overly zealous, and not thorough at all in his investigation. Had he been thorough, he would have first looked at petitioner's personnel file where he would have immediately discovered that petitioner was married to a Japanese woman and that he was an advanced student of Japanese; he also would have discovered that petitioner had filed a notice with his employer relative to Questant Enterprises, a career counseling firm. Furthermore, had he conversed with friends and associates of petitioner, he would have discovered that petitioner had already had a few extramarital affairs and that his wife knew of some of these affairs. However, Agent Jensen made no preliminary inquiries; instead, he made the immature assumption that because petitioner had a Japanese/English dictionary that he might have contacted a foreign agent, presumably Japanese (our allies). He also made the immature assumptions that the possession of a checkbook and gems could have some remote connection with blackmail attempts. Agent Jensen was overzealous when he seized all of these personal materials and even went so far as taking framed photographs of petitioner's wife and daughter, thinking

they might be "illicit" associates. How blatantly invasive of privacy and how far away from reality can a "trained" investigator be? Witnessing this raid on his office and personal effects was the most traumatic event experienced by petitioner in his entire lifetime.

5. Page 5, Footnote 3 - Petitioner objects to the assumption that because he wanted to keep something "secret" from his family, that this automatically makes him susceptible to blackmail. Every situation has to evaluated in the proper context. Petititoner also objects to the insinuation that he composed personal letters while on duty. Petitioner frequently carried the Manila envelope through the gate and to the Pomona Public Library and/or Pomona Post Office where he composed or mailed letters. Petitioner usually carried the envelope in his vehicle on such occasions and it was never examined.

6. Page 7, Footnote 4 - While Petitioner has denied that he is actually bisexual, he nevertheless challenges the constitutionality of the Navy's regulations on the grounds that they are inconsistent with that of other services, such as the Army. The traditional Navy position that being out at sea for extended periods would expose heterosexuals to the mercy of homosexual/bisexuals is quite archaic. Firstly, men and women serve side-by-side on Navy vessels today; secondly, voyages are of much shorter duration today than in the 18th century; and thirdly, because of the sexual preference population distribution today, there is no more such exposure aboard ship than there would be on the shore.

7. Page 12 - Petitioner concedes that Kessel may have acted properly in responding to the anonymous tip and examining the material in the manila envelope in pursuance of his official duties; however, petitioner contends that Kessel invaded his privacy when he seized the material and turned it over to outside authorities. A private matter can still

remain such when confined to only one other person, particularly if such person really believed that he had acted within the scope of his official duties and did not divulge the information to others. But when the matter is exposed to various other individuals and agencies, it is no longer private and, as in this case, resulted in dire consequences. Both private and public respondents overemphasize the "invasive" nature of the Pomona facility. Any employer, public or private, usually has keys to their employees' desks and may, from time to time, be required to enter such desks in their employees' absence when looking for a needed document or other work-related materials. Because such a condition exists should not void the reasonable expectation of privacy on the part of such employees with respect to personal materials such as letters, notebooks, dictionaries, etc. left in the desks which are of no concern to the employer. It seems conclusive to petitioner that it is totally unreasonable for respondents to assume that petitioner may be a national security threat because of extramarital affairs. Would respondents advocate that marital fidelity become a condition of receiving a security clearance or that such employees be subjected to intense investigations to determine their loyalty to the United States of America?

8. Page 13, Paragraph 2.a. - Petitioner objects to the phrase "factual finding" with respect to the alleged bisexuality of petitioner. Because respondents make a declaration that something is a "factual finding" and convince the lower courts to rule accordingly does not make it a fact. Respondents have consistently misquoted petitioner in stating that he admitted that he was bisexual; petitioner only admitted that in his correspondence he had stated that he was bisexual but denied being actually bisexual. Petitioner submits that such a ruling of "factual

finding" does not fit the definition of evidence in the Federal rules.

9. Page 13, Paragraph 2.b. - Again, respondents place petitioner in the class of those service members discharged for admission or commission of homosexual acts when the record clearly shows that petitioner merely indicated an interest in bisexuality to correspondents during a limited period in the early 1980s and never actually committed any such acts. Petitioner's sexual orientation toward females is well-known among friends, associates, and his immediate family. While petitioner believes that military rules against homosexuality are unconstitutional, irrelevant, archaic, and will eventually be abandoned, he has not sought equal protection on these grounds because he is not a homosexual. An examination of cases cited will quickly reveal that petitioner's situation is quite different from those cited. Prior to Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) there was a close analogy between Ben-Shalom and the petitioner's case as cited in the Petition at Page 17 under Ben-Shalom v. Secretary of the Army 489 F Supp 964 (1980 E.1 Wis) where it was disclosed that there was no evidence of homosexual acts with, or advances to, other reserve personnel. However, in the instant case petitioner has denied any bisexuality or homosexuality and, as stated herein, his orientation is that of a heterosexual as all of his affairs have been with women. Furthermore, in Ben-Shalom v. Marsh supra, Ben-Shalom evidently increased her propensity toward the same sex and insisted upon continuance of this orientation while still in the military and when seeking to re-enlist. Respondents cite Woodward v. United States, 871 F.2d 1068 (Fed.Cir.1989), wherein a Naval officer and admitted homosexual, went one step further and insisted on continuance of his lifestyle and even went so far as to write a letter to the Chief of Naval Personnel stating

in part:

> ...I am, and have been, since I became sexually aware, primarily homosexually oriented...I do, and will continue to associate with other homosexuals...I respectfully request the chance to contribute to the defense of the United States and am an honest, open "gay" officer.

While such honesty is commendable, the world and particularly the military is unfortunately not ready for this degree of candor. When petitioner was in the military, he respected the laws then in force and never insisted on a lifestyle in conflict with these laws. Likewise, the other cases cited by respondents, i.e. Rich v. Secretary of the Army, 735 F.2d 1220, Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987), and Bowers v. Hardwick, 478 U.S. 186 (1986) involve admitted homosexuals who insist on their lifestyle in opposition to existing law. There is no analogy in the instant case. Petitioner received above average evaluations as a Naval Reservist as can be seen by examining his personnel record but he was not clearly cognizant that bisexual activity was prohibited. He only engaged for a brief time in a fantasy writing exercise wherein he expressed an interest in bisexual activity with couples and not with single males. However, as can be seen by the writings, the majority of his letters were addressed to females and his orientation was definitely heterosexual. When it seemed apparent that many of the correspondents were con artists who only wanted to sell photographs or membership in a club which did not result in any actual contacts, petitioner discontinued the exercise. He then decided to gather statistical information relative to the number of correspondence exchanges and write an expose on the "swinging" circle and the con artists operating under its umbrella; however, the raid on his office and personal effects was so traumatic and damaging to his creative psyche that he never recovered sufficiently to pursue this effort.

IV

SUMMARY AND CONCLUSION

In seizing petitioner's personal materials and exposing his private affairs to others, private respondents exceeded their responsibility as security custodians under contract with the government and violated petitioner's fourth and fifth amendment rights. The "operational realities" of the workplace were not so restrictive that petitioner should have been deprived of a reasonable expectation of privacy for personal materials in his office. In seizing other personal items unrelated to his work, government respondents violated petitioner's first, fourth, and fifth amendment rights. Investigator Kessel made hasty and unfounded judgments relative to the significance of petitioner's personal materials. Agent Jensen was overly zealous, immature in judgments, and performed no investigation prior to the seizure. Neither private nor government respondents should be granted immunity for such actions which have caused irreparable harm to petitioner's military and civilian career. The Navy also erred in discharging petitioner for merely engaging in a correspondence exercise when there was no evidence of actual bisexual acts. Petitioner has asked the Court to review issues and judgments and not factual determinations. A Supreme Court review and decision in this case could have very important legal implications for employees and employers alike in all sectors of society and could set a landmark precedent for privacy in the workplace. Petitioner respectfully urges that the Court issue a writ of certiorari to review the lower court's judgment and opinion in this matter.

Dated: 13 March 1992

Richard N. Schowengerdt
In Propria Persona

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OF THE UNITED STATES
OCTOBER TERM 1991

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v.

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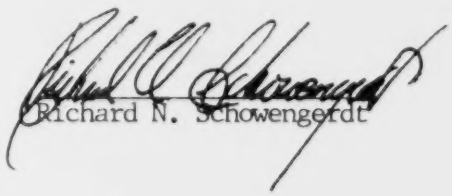
PROOF OF SERVICE

I, Richard Neal Schowengerdt, do swear or declare that on this date, 13 March 1992, pursuant to Supreme Court Rules 9, 12.1, 29.3, and 29.4, I have served the attached REPLY BRIEF OF PETITIONER on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and witn first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530
Attn: Anthony J. Steinmeyer
E. Roy Hawkens

Gibson, Dunn & Crutcher
2029 Century Park East, Ste. 4000
Los Angeles, CA 90067
Attn: Nancy P. McClelland


Richard N. Schowengerdt

STATE California
COUNTY OF Los Angeles

SUBSCRIBED AND SWORN (OR AFFIRMED) TO
BEFORE ME THIS 13th DAY OF MARCH 1992.

Evangelene Francis
EVANGELENE FRANCIS